

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE:

B-218074

DATE: April 23, 1985

MATTER OF:

The Analytic Sciences Corporation

DIGEST:

1. GAO recommends that the agency reexamine its determination to exclude the protester from competing under a follow-on procurement, based on an organizational conflict of interest, where it appears that the protester may be exempt from any competitive restriction under the Federal Acquisition Regulation as a development and design contractor.
2. Under GAO's Bid Protest Regulations, the recovery of costs for filing and pursuing the protest, including attorney's fees, and bid and proposal preparation costs, may be allowed where the agency has unreasonably excluded a protester from the procurement. Since GAO has not ultimately decided whether the protester here is being unreasonably excluded, but rather has recommended that the agency reexamine its position in view of GAO's expressed concerns in the matter, the protester's request for the allowance of any costs is premature.

The Analytic Sciences Corporation (TASC) protests the Department of the Air Force's decision declaring the firm ineligible to compete under request for proposals No. F34601-84-R-47065 (RFP-47065) because of an organizational conflict of interest. TASC asserts that the Air Force's action is improper under a prior contractual provision which indicated that the firm would remain eligible for follow-on contracts.

We sustain the protest on the basis that the present record does not clearly show that the Air Force's action is justified. We recommend that the Air Force reexamine its determination.

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Background

RFP-47065 was issued on July 23, 1984, to obtain the services required to develop, implement and support a Technical Support Center at Tinker Air Force Base, Oklahoma (Center). The procurement represents the second phase of a three-phase effort to establish the Center, which will provide technical support to the Strategic Air Command in resolving problems associated with the B-1B bomber program. The Center will have the necessary communications and computer support equipment to enable engineering and logistics management personnel to understand B-1B technical problems as they arise, access the necessary technical resources to analyze possible solutions, and develop and provide approved solutions to the appropriate activities.

RFP-47065 was a follow-on procurement to the first phase of the acquisition which involved the analysis of the requirements for the Center and the preparation of the work statement to be utilized in the solicitation for the second phase. TASC was the contractor for the first phase under contract No. F34601-84-C-0034, which had been awarded competitively.

The solicitation for the first phase originally contained the following "Competitive Restriction" clause:

"The Contractor who receives this award shall not be a supplier of weapons systems, software or support equipment applicable to any aircraft families. Further, the Contractor shall not be allowed to use expertise/knowledge gained from this contract to become a supplier of weapons systems, software or support equipment for a period of five (5) years after completion of this contract."

This clause was later amended to read as follows:

"The Contractor who receives this award shall not be a supplier of hardware or support equipment applicable to establishment of the B-1B Technical Support Center."

Further, the contractor shall not be allowed to become a supplier of hardware or support equipment applicable to the B-1B Technical Support Center for a period of five (5) years after completion of this contract."

The amended provision was incorporated into the resulting contract for the first phase. The record shows that the contracting officer for the first phase assured TASC that this competitive restriction clause would not preclude the firm, a supplier of software, from competing under the second-phase procurement.

However, TASC was not solicited under RFP-47065 because the Air Force subsequently decided that the firm was ineligible due to an organizational conflict of interest. Nevertheless, TASC requested a copy of the RFP and submitted a proposal, which was evaluated. Because the only other proposal received in response to RFP-47065 was deemed to be technically unacceptable and TASC's proposal appeared to be acceptable, the contracting office submitted a request to Air Force Headquarters for a waiver of the applicable regulations governing organizational conflicts of interest so that TASC could be awarded the second-phase contract. Air Force Headquarters refused to grant the waiver and advised the contracting office to cancel RFP-47065 and issue a new solicitation specifically providing that TASC would be ineligible to compete.

The Air Force's decision that TASC has an organizational conflict of interest is based on the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.505-2(b)(1) (1984), which provides that:

"If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services--or provides material leading directly, predictably, and without delay to such a work statement--that contractor may not supply the system, major components of the system, or the services unless--

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement."

This provision reflects the recognition that an organizational conflict of interest exists when the nature of the work to be performed under a proposed government contract may, without some restriction on future activities, result in an unfair competitive advantage to the contractor or may impair the contractor's objectivity in performing the contract work. See 48 C.F.R. § 9.501. When an agency needs a contractor's assistance in preparing a work statement, the FAR recognizes that the contractor may often be in a position to favor its own products and capabilities and, thus, to overcome the possibility of bias, provides that such contractors are to be prohibited from supplying a system or services acquired on the basis of work statements growing out of their services unless one of the three enumerated exceptions are applicable. See 48 C.F.R. § 9.505-2(b)(2).

The Air Force has determined that TASC is ineligible to compete under the second-phase procurement to develop, implement and support the Center because the firm prepared the work statement for that requirement under its prior first-phase contract^{1/}. The Air Force has concluded that the first-phase contract did not represent a development and design effort, one of the above-enumerated exceptions, as similar technical support activities have already been developed for other weapons systems.

TASC asserts that the Air Force's action in declaring the firm ineligible is improper where the competitive restriction provision contained in the first-phase solicitation, and incorporated into its prior contract, specifically indicated that it could compete under the

^{1/} We note, however, that the Air Force's administrative report does not specify the reasons why, or at what point, it was subsequently determined that a conflict of interest existed, where such a determination is seemingly at variance with the agency's original position in the matter.

second-phase procurement since the firm is a supplier of software and not a supplier of hardware or support equipment. TASC urges that it relied upon this provision and also upon the first-phase contracting officer's contemporaneous interpretation and affirmation of that provision in competing under the first-phase procurement. In this regard, TASC contends that it would not have competed if it had known that it would be precluded from competing for the second-phase contract, which has a much greater estimated value. Further, TASC asserts that, in any event, the first-phase contract to prepare the work statement was in the nature of a development and design requirement and, therefore, the firm was specifically exempted from any organizational conflict of interest restriction in accordance with the FAR, 48 C.F.R. § 9.505-2(b)(1)(ii). We believe the protest has merit.

Analysis

At the outset, we note that the competitive restriction in the first-phase contract apparently was based upon the organizational conflict of interest rules in the Defense Acquisition Regulation (DAR), § 1-113.2, and the related appendix "G," reprinted in 32 C.F.R. pts. 1-39 (1983), which, in part, provide that competitive restrictions may only be imposed by a specific contract clause to that effect, and that potential contractors must be advised in the solicitation as to the extent of applicability of the conflict of interest rules and be given the opportunity to negotiate the terms of the clause. TASC argues that those rules also are controlling in this matter because the first-phase contract was awarded prior to the April 1, 1984, effective date of the FAR, which has superseded the DAR. The Air Force disagrees and urges that the FAR's organizational conflict of interest rules are controlling because all significant procurement actions related to RFP-47065 (the execution of the task order and the issuance of the solicitation itself) took place after April 1, 1984. The Air Force is correct in this regard, as we have held that the date of the award of the original contract is irrelevant in determining which organizational conflict of interest rules apply. Rather, where all significant actions relating to the follow-on procurement have taken place after the FAR's effective date, as here, the FAR provisions are controlling. LW Planning Group, B-215539, Nov. 14, 1984, 84-2 CPD ¶ 531.

However, a close reading of both regulations reveals that there is no substantive difference between their respective policies as to the possible conflict of interest that may arise when a contractor who writes a work statement is allowed to compete under the follow-on procurement which utilizes that work statement. Both regulations prohibit that contractor from competing unless the preparation of the work statement was in the nature of a development and design contract. See DAR, appendix "G," rule 3; FAR, 48 C.F.R. § 9.505-2(b)(3).

As support for its position that TASC is ineligible to compete despite the prior competitive restriction provision which indicated that the firm would not be excluded, the Air Force in large part relies upon our recent decision in LW Planning Group, B-215539, supra. In that decision, we held that it is clear under the FAR, 48 C.F.R. §§ 9.505-2(b)(1) and -2(b)(2), that a firm which drafts a work statement might be in a position to favor its own capabilities, thereby gaining an unfair competitive advantage under the follow-on procurement. Therefore, we found that an agency's decision to exclude such a firm from competing because it had a conflict of interest was not unreasonable. We noted that while the record did not reflect whether the protester's prior contract contained notice that the firm would be precluded from the award of any future contract to perform the work required under that work statement, a contracting agency may properly disqualify a firm because of an organizational conflict of interest even though prior notice was not given the firm in the earlier contract. See Acumenics Research and Technology, Inc., B-211575, July 14, 1983, 83-2 CPD ¶ 94.

We agree with the Air Force that TASC should be excluded from competing for the follow-on work if an organizational conflict of interest exists. We question, however, whether the Air Force's determination that a conflict exists is well-founded, where the record does not establish that TASC would not be exempt from the FAR competitive restriction as a development and design contractor.

We note that the solicitation for the first-phase contract to analyze the Center's requirements and prepare the work statement makes numerous references to development and design:

"2.1 Task 1 Functional Analysis

Perform a functional analysis. . . . New and creative methods such as use of video, gateway computers, color graphics, intelligent workstations, expert systems (artificial intelligence) and other new techniques must be considered. . . . It is anticipated that new functional requirements will be identified under this task as new technologies are found . . .

2.2 Task 2 Communications and Interface Analysis

Requirements for local area networks, communications between users, and communications with other . . . data sources will be developed. . . . Where existing or planned capabilities will not be available to support projected requirements, the system design shall show appropriate additional hardware and software systems needed to establish the TSC [Technical Support Center].

[T]he contractor shall design a fully functional TSC as required to satisfy all intended requirements.

The output of this Task will be a report containing the design of the prototype and fully functional TSC. . . ."

In view of the language employed in these solicitation provisions, it appears to us that TASC may have served in the role of a development and design contractor.

The Air Force argues that the development and design exemption from the conflict of interest rules for contractors who prepare work statements, as provided for in the FAR, only applies to those contractors who have already developed their own unique system, and who now write a work statement for a follow-on procurement to produce that system. See 48 C.F.R. § 9.509(c). However, it is our view that the first-phase requirement here possibly involved the

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development and design of new software capability in performing the contract, rather than only the utilization of off-the-shelf software items, which may give rise to the exemption.

We are concerned that the record does not clearly demonstrate that TASC's prior performance of the first-phase contract would now give the firm an unfair advantage in competing for the second-phase procurement so as to necessitate the firm's exclusion under the conflict of interest rules. As indicated, we believe that the possible development and design nature of the contract to analyze the Center's requirements and write the work statement may exempt the firm from any competitive restriction in accordance with the FAR, 48 C.F.R. § 9.505-2(b)(1)(ii), supra.

As the responsibility for determining whether a firm has a conflict of interest rests with the procuring agency, LW Planning Group, B-215539, supra, we are accordingly recommending to the Secretary of the Air Force by separate letter of today that the determination to exclude TASC from competing for the second-phase procurement be reexamined in view of the concerns noted by this decision.

The protest is sustained.

TASC also requests that it be allowed its costs of filing and pursuing the protest, including attorney's fees, and its proposal preparation costs.

Our Bid Protest Regulations provide that the recovery of costs for filing and pursuing the protest, including attorney's fees, and bid and proposal preparation costs, may be allowed where the contracting agency has unreasonably excluded the protester from the procurement. See 4 C.F.R. § 21.6 (1985). However, since we have not ultimately decided that TASC is being unreasonably excluded from the second-phase procurement, but rather have recommended that the Air Force reexamine its position in the matter, TASC's request for the allowance of any costs is premature.

for *Larry D. San Clement*
Comptroller General
of the United States